

STEVEN M. SCHATZ, sschatz@wsgr.com, State Bar No. 118356
BORIS FELDMAN, boris.feldman@wsgr.com, State Bar No. 128838
RODNEY G. STRICKLAND, rstrickland@wsgr.com, State Bar No. 161934
GREGORY L. WATTS, gwatts@wsgr.com, State Bar No. 197126
NICOLE HEALY, nhealy@wsgr.com, State Bar No. 157147
PAMELA E. GLAZNER, pglazner@wsgr.com, State Bar No. 247007
WILSON SONSINI GOODRICH & ROSATI
Professional Corporation
650 Page Mill Road
Palo Alto, CA 94304-1050
Telephone: (650) 493-9300
Facsimile: (650) 565-5100

Attorneys for Defendant
Marvell Technology Group Ltd.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re Marvell Technology Group, Ltd.
Securities Litigation

Master File No. C-06-6286 RMW

CLASS ACTION

THIS DOCUMENT RELATES TO:

All Actions.

**MARVELL'S OPPOSITION TO
LEAD PLAINTIFFS' MOTION FOR
PARTIAL MODIFICATION OF
THE PSLRA DISCOVERY STAY**

DATE: September 12, 2008

TIME: 9:00 a.m.

JUDGE: Hon. Ronald M. Whyte

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| 15 U.S.C. § 78u-4(b)(3)(B) | <i>passim</i> |
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MISCELLANEOUS

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| S. Rep. No. 104-98 (1995), <i>reprinted in</i> 1995 U.S.C.C.A.N. 693 | 5 |
| H. R. Conf. Rep. No. 104-369 (1995) <i>reprinted in</i> 1995 U.S.C.C.A.N. 731 | 1, 8 |

1 Defendant Marvell Technology Group, Ltd. (“Marvell” or the “Company”) respectfully
 2 submits this Opposition to Lead Plaintiff’s Motion for Partial Modification of the PSLRA
 3 Discovery Stay (the “Motion”).

4 INTRODUCTION

5 This is a securities class action governed by the Private Securities Litigation Reform Act of
 6 1995 (the “PSLRA” or the “Reform Act”). The PSLRA mandates that “all discovery and other
 7 proceedings shall be stayed during the pendency of any motion to dismiss.” 15 U.S.C. § 78u-
 8 4(b)(3)(B). Marvell and the other defendants filed their motions to dismiss on October 18, 2007.
 9 Thus, all discovery is stayed unless and until plaintiffs can demonstrate “exceptional
 10 circumstances” that “particularized discovery is necessary to preserve evidence or to prevent
 11 undue prejudice [to plaintiffs].” *Id*; *SG Cowen Sec. Corp. v. United States Dist. Ct.*, 189 F.3d 909,
 12 911-12 (9th Cir. 1999) (quoting H.R. Conf. Rep. No. 104-369, at 37 (1995), *reprinted in* 1995
 13 U.S.C.C.A.N. at 736). They cannot do so.

14 As explained below, the Ninth Circuit has vigilantly protected against any erosion of the
 15 PSLRA’s discovery stay by twice employing the extraordinary remedy of granting a writ of
 16 mandamus. *See SG Cowen*, 189 F.3d 909; *Medhekar v. United States Dist. Ct.*, 99 F.3d 325 (9th
 17 Cir. 1996). Following the Ninth Circuit’s lead, courts in this Circuit frequently deny similar
 18 requests to lift the PSLRA discovery stay. Plaintiffs have cited only one case in this Circuit in
 19 which the discovery stay was lifted, and that case involved very difference circumstances than
 20 those present here.

21 Simply put, there are no valid grounds for lifting the discovery stay in this case. In fact,
 22 this Court enforced the discovery stay in a related case involving the same corporate defendant,
 23 the same underlying factual allegations, and many of the same arguments by plaintiffs’ counsel.
 24 *In re Marvell Tech. Group, Ltd. Deriv. Litig.*, No. C-06-03894-RMW, 2007 WL 1545194 (N.D.
 25 Cal. May 29, 2007) (ordering stay of discovery). This Court also rejected plaintiffs’ overture
 26 during the motion to dismiss hearing in this action to lift the discovery stay for the same
 27 documents requested in plaintiffs’ instant Motion. Those documents are the following:
 28

- a. Copies of all documents collected and/or reviewed by Marvell's Special Committee and/or outside auditors in conjunction with their investigation of the conduct at issue in this case;
- b. Copies of all documents produced in conjunction with the SEC and DOJ investigations;
- c. Copies of all documents, if any, produced to the Derivative Action plaintiffs in connection with the investigation into Marvell's fraudulent stock option backdating; and
- d. Any draft and final reports the Special Committee created in connection with its investigation into Marvell's fraudulent stock option backdating.

Pl. Mem. at 5.¹

Plaintiffs contend that these documents should be produced for a variety of reasons. None rises to the level of the "exceptional circumstances" required by the statute. For example, plaintiffs assert that certain of the documents should not be subject to the stay because they have been provided to government agencies and the derivative action plaintiffs. *Id.* at 8-9. This assertion finds no support in the text or purposes of the PSLRA. Congress did not create an exception to the PSLRA discovery stay for private securities plaintiffs seeking to exploit simultaneous government investigations or other civil actions. Indeed, it is quite common in securities class actions for there to be simultaneous SEC investigations and derivative actions. If providing documents to the SEC or derivative plaintiffs in these parallel proceedings constitutes undue prejudice to class action plaintiffs, the discovery stay would be eviscerated.

Plaintiffs also argue that these documents should be produced because plaintiffs allegedly need them in order to "make informed decisions about their litigation strategy" and improve their settlement prospects relative to other interested parties. *Id.* at 4. Plaintiffs, however, cannot escape their own cited authority. The courts in *WorldCom*, *Enron*, *Delphi*, *Lernout* and *Royal Ahold* only found undue prejudice related to settlement prospects or a risk that evidence would be destroyed when the defendants were in bankruptcy or dire financial straits. There are no similar allegations here and, in any event, there is no such risk with respect to Marvell because Marvell is

¹ Citations to "Pl. Mem." are to Lead Plaintiffs' Notice of Motion and Motion for Partial Modification of the PSLRA Discovery Stay; Memorandum of Points and Authorities in Support Thereof.

1 financially healthy and has ample cash (over \$700 million) to cover any settlement even if
2 insurance proceeds are not available.

3 Unable to demonstrate any undue prejudice, plaintiffs attempt to re-write the statute to
4 include exceptions to the discovery stay for discovery that allegedly present a minimal burden on
5 the defendant or in cases that are not (according to plaintiffs) representative of the abuses the
6 PSLRA was designed to prevent. Again, plaintiffs' assertion finds no support in the statute or
7 case law. The proper inquiry under the PSLRA is whether the plaintiff would be unduly
8 prejudiced by the stay, *not* whether the defendant would be burdened by lifting the stay. Further,
9 "Congress did not merely instruct courts to stay discovery in cases in which courts perceived
10 abuses." *Marvell*, 2007 WL 1545194, at *3.

11 Plaintiffs also attempt to argue that the requested documents—documents they do not
12 doubt will be preserved—"could assist" them "in identifying other specific materials that may be
13 at risk of loss." Pl. Mem. at 15. This contention is nowhere close to reaching plaintiffs' burden of
14 showing that the loss of evidence is imminent as opposed to merely speculative, and certainly does
15 not constitute an exceptional circumstance. Moreover, plaintiffs' requests are not sufficiently
16 particularized and would unduly burden Marvell in reviewing documents for relevance and
17 privilege.

18 In short, plaintiffs have not demonstrated the "exceptional circumstances" necessary to lift
19 the PSLRA discovery stay. The Court should deny plaintiffs' Motion and let discovery in this
20 securities class action proceed along the course Congress intended.

21 **BACKGROUND AND PROCEDURAL HISTORY**

22 On May 22, 2006, Merrill Lynch issued a research analyst report that examined the timing
23 of stock option grants by semiconductor equipment companies, including Marvell. This report
24 triggered an internal review by a Special Committee of Marvell's Board of Directors, an SEC
25 inquiry, shareholder derivative lawsuits and this shareholder class action. On July 2, 2007,
26 following the completion of the Special Committee's internal review, Marvell restated its
27 consolidated financial statements and related disclosures.

1 This Class Action: The first complaint in this action was filed on December 5, 2006.
2 Plaintiffs filed their Consolidated Class Action Complaint (the “Complaint”) in August 2007
3 alleging federal securities laws violations against the Company, as well as certain individual
4 directors and officers. Defendants moved to dismiss the Complaint on October 18, 2007. The
5 Court held a hearing on the motions to dismiss the Complaint on February 15, 2008.

6 SEC Action: On April 20, 2007, the SEC informed Marvell that it was conducting a
7 formal investigation into the Company’s stock option granting practices. Marvell cooperated with
8 the SEC’s investigation. On May 8, 2008, the SEC filed in this Court a civil complaint against
9 Marvell and one of its employees captioned *SEC v. Marvell Technology Group, Ltd., et al.*, Case
10 No. CV-08-2367-HRL. That same day Marvell announced that it had reached an agreement with
11 the SEC whereby the Company, without admitting or denying the allegations in the SEC’s
12 complaint, consented to a permanent injunction against any future violations of various provisions
13 of the federal securities laws and agreed to pay a civil penalty of \$10 million. On July 1, 2008, the
14 Court entered a final judgment against the Company. The Company shortly thereafter paid the
15 civil penalty (without using any insurance proceeds). This settlement and consented judgment
16 concluded the SEC matter.

17 Derivative Actions: Starting on June 22, 2006, several purported shareholder derivative
18 actions were filed in this Court against Marvell and certain of its officers and directors. On May 1,
19 2007, this Court consolidated these actions. The consolidated derivative complaint includes
20 alleged violations of the federal securities laws. On May 29, 2007, this Court denied the
21 derivative plaintiffs’ request for discovery due to the PSLRA’s discovery stay. *See Marvell*, 2007
22 WL 1545194, at *4. The derivative plaintiffs argued, as plaintiffs argue here, that the PSLRA
23 discovery stay does not apply because their case is not (according them) representative of the
24 perceived abuses the PSLRA was designed to stop. This Court rejected this argument, stating that
25 “Congress did not merely instruct courts to stay discovery in cases in which courts perceived
26 abuses.” *Id.* at *3.

27 On March 5, 2008, the parties in the derivative action entered into a Memorandum of
28 Understanding (“MOU”) that tentatively settles and resolves the derivative action, subject to this

1 Court's preliminary and final approval. The terms of the MOU include certain corporate
 2 governance enhancements and an agreement by the Company to pay up to \$16 million in
 3 plaintiffs' attorneys' fees. The Company anticipates filing a stipulation of settlement with this
 4 Court in the coming weeks.

5 ARGUMENT

6 **I. THE PSLRA AND NINTH CIRCUIT PRECEDENT REQUIRE A DISCOVERY** 7 **STAY UNTIL THIS COURT HAS SUSTAINED THE LEGAL SUFFICIENCY OF** 8 **A COMPLAINT**

9 The PSLRA mandates that in private actions asserting violations of the Securities
 10 Exchange Act of 1934, "all discovery and other proceedings shall be stayed during the pendency
 11 of any motion to dismiss, unless the court finds upon the motion of any party that particularized
 12 discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15
 13 U.S.C. § 78u-4(b)(3)(B). The Ninth Circuit has interpreted this provision to mean that
 14 "'discovery should be permitted in securities class actions *only after the court has sustained the*
 15 *legal sufficiency of the complaint.*'" *SG Cowen*, 189 F.3d at 912-13 (quoting S. Rep. No. 104-98,
 at 14 (1995), *reprinted in* 1995 U.S.C.A.N. at 693).

16 The Ninth Circuit has twice granted petitions for a writ of mandamus enforcing the
 17 PSLRA discovery stay and directing district courts to properly apply the stay's provisions. In
 18 *Medhekar*, 99 F.3d at 328, the Ninth Circuit held in a *per curiam* opinion that the PSLRA
 19 discovery stay included initial disclosures. In *SG Cowen*, the Ninth Circuit denied a request by
 20 class action plaintiffs to lift the PSLRA discovery stay and held that a "failure to muster facts
 21 sufficient to meet the Act's pleading requirements cannot constitute the requisite 'undue
 22 prejudice' to the plaintiff justifying a lift of the [PSLRA] discovery stay." 189 F.3d at 913.
 23 Plaintiffs fail to even acknowledge these two Ninth Circuit decisions in their Motion.

24 District courts in this Circuit have also consistently denied requests to lift or partially lift
 25 the PSLRA's discovery stay. *See, e.g., In re PMC-Sierra, Inc. Deriv. Litig.*, No. 06-05330 RS,
 26 2008 WL 2024888, at *4 (N.D. Cal. May 8, 2008) (Seeborg, J.) (denying plaintiffs' motion to lift
 27 the discovery stay in federal derivative action); *In re Asyst Techs., Inc. Deriv. Litig.*, No. C-06-
 28 04669 EDL, 2008 WL 916883, at *2-3 (N.D. Cal. April 3, 2008) (Laporte, J.) (denying plaintiffs'

1 motion to partially lift discovery stay so they could obtain documents produced by Asyst to the
 2 SEC and DOJ); *In re Countrywide Fin. Corp. Deriv. Litig.*, 542 F. Supp. 2d 1160, 1181 (C.D. Cal.
 3 2008) (Pfaelzer, J.) (denying plaintiffs' motion for expedited discovery of documents due to
 4 PSLRA discovery stay); *Swartz v. Deutsche Bank AG*, No. C03-1252-MJP, 2008 WL 534535, at
 5 *1 (W.D. Wash. Feb. 26, 2008) (Pechman, J.) (denying plaintiffs' motion to lift discovery stay for
 6 documents produced in other civil and criminal matters); *In re Am. Funds Sec. Litig.*, 493 F. Supp.
 7 2d 1103, 1107 (C.D. Cal. 2007) (Feess, J.) (denying plaintiffs' motion to partially lift discovery
 8 stay so they could obtain documents produced to the California Attorney General's Office);
 9 *Marvell*, 2007 WL 1545194, at *4 (Whyte, J.) (refusing to lift discovery stay in federal derivative
 10 action); *In re Lantronix, Inc. Sec. Litig.*, No. CV 02-03899 PA, 2003 WL 22462393, at *1-2 (C.D.
 11 Cal. Sept. 26, 2003) (Anderson, J.) (denying plaintiffs' motion to partially lift discovery stay so
 12 they could obtain documents Lantronix produced to governmental entities and in parallel state
 13 court actions); *In re NextCard Inc. Sec. Litig.*, No. C-01-21029-JF, 2003 WL 23142199, at *2
 14 (N.D. Cal. Sept. 17, 2003) (Fogel, J.) (denying plaintiffs' request to partially lift discovery stay in
 15 class action so they could obtain documents NextCard produced to the SEC, FDIC and the Office
 16 of the Comptroller of the Currency); *In re Fluor Corp. Sec. Litig.*, No. SA CV 97-734 AHS EEX,
 17 1999 WL 817206, at *1, 3 (C.D. Cal. Jan. 15, 1999) (Stotler, J.) (denying plaintiffs' motion to
 18 partially lift discovery stay so they could issue "preservation subpoenae" on third-parties).

19 In fact, this very Court in this very action rejected plaintiffs' counsel's overture during oral
 20 argument on the pending motion to dismiss to partially lift the discovery stay:

21 Mr. Tabacco:

22 . . . What would be the burden of the Company for you to say today, "you
 23 know what? There's enough going forward here, *why don't you guys turn over*
 24 *the documents you've already produced to the Department of Justice, turn over*
 25 *the documents you've already organized and turned over to the Securities and*
 26 *Exchange Commission. Let the plaintiffs get what the other people have had for*
 27 *two years,"* rather than waiting for the extended period of time it's going to take if
 28 we somehow partially grant and partially deny, then we're going to come back in
 six or eight months, we'll have another amendment, we'll then issue our
 document request.

Let's get this thing on a fast track, judge, because one of the great things
 that works to the disadvantage of the shareholders and the institutions it takes to
 bring these cases is the time it takes just to get off the dime. Already it's been - -

1 we're approaching almost two years. *So I would ask you to consider today just*
 2 *letting us go ahead with that first stage. What's the harm in that?*

3 The Court:

4 Isn't it against the law, though?

5 Transcript of Proceedings Before the Honorable Ronald M. Whyte, United States District Judge at
 6 32-33, *In re Marvell Technology Group, Ltd. Sec. Litig.*, No. C-06-06286 (N.D. Cal. Feb. 15,
 7 2008) (emphasis added).²

8 **II. PLAINTIFFS FAIL TO SATISFY THEIR BURDEN OF SHOWING**
 9 **EXCEPTIONAL CIRCUMSTANCES THAT JUSTIFY LIFTING THE PSLRA**
DISCOVERY STAY

10 It is plaintiffs' burden to establish "that particularized discovery is necessary" to either
 11 "preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B).
 12 *See, e.g., Countrywide*, 542 F. Supp. 2d at 1179 ("Plaintiffs have not demonstrated the need for
 13 an exception to the PSLRA."); *Am. Funds*, 493 F. Supp. 2d at 1107 ("Plaintiffs have failed to
 14 establish they will suffer undue prejudice . . . as required by to justify lifting the PSLRA's
 15 discovery stay."); *Marvell*, 2007 WL 1545194, at *2 (denying stay because plaintiffs failed to
 16 show the stay would lead to the destruction of evidence or cause them undue prejudice).³ Here,
 17 plaintiffs fail to satisfy their burden of establishing that either of these "exceptional
 18 circumstances" exists.

19 **A. There Is No Imminent Risk That Discovery Will Be Lost**

20 In order to meet their burden that the discovery stay should be lifted to preserve evidence,
 21 plaintiffs must show that the "loss of evidence is imminent as opposed to merely speculative."
 22 *In re Vivendi Universal, S.A. Sec. Litig.*, 381 F. Supp. 2d 129, 130 (S.D.N.Y. 2003) (Berman, J.)

23
 24 ² Attached to the Declaration of Pamela E. Glazner In Support of Marvell's Opposition to
 25 Lead Plaintiffs' Motion for Partial Modification of the PSLRA Discovery Stay ("Glazner Decl.")
 as Exhibit A.

26 ³ *See also In re Odyssey Healthcare, Inc. Sec. Litig.*, No. Civ.A.3:04-CV-0844-N, 2005 WL
 27 1539229, at *2 (N.D. Tex. June 10, 2005) (Godbey, J.) ("[i]t is the burden of any plaintiff
 28 seeking an exception to the stay to explain why."); *In re Fannie Mae Sec. Litig.*, 362 F. Supp. 2d
 37, 38 (D.D.C. 2005) (Leon, J.) ("The plaintiffs bear the [heavy] burden of establishing that
 lifting of the mandatory stay is necessary.").

(internal quotations and citations omitted). Here, plaintiffs concede that “the documents produced [by Marvell] to outside [government] agencies presumably will be preserved. . . .” Pl. Mem. at 15. *This concession is fatal to plaintiffs’ effort to satisfy the “necessary to preserve evidence” exception to the discovery stay.*

Plaintiffs’ generic and speculative argument that the requested documents “could assist” them “in identifying other specific materials that may be at risk of loss” (*id.*) could be made in any case governed by the PSLRA subject to a discovery stay. It is exactly the sort of argument that courts reject as insufficient to overcome the discovery stay. *See, e.g., Fluor*, 1999 WL 817206, at *3 (“Plaintiffs also fail to make any credible showing that discovery is necessary to preserve evidence beyond generalizations of fading memories and allegations of possible loss or destruction.”). Plaintiffs reliance on *In re Royal Ahold N.V. Securities & ERISA Litigation*, 220 F.R.D. 246 (D. Md. 2004), the only support for their contention, is misplaced. Unlike the present situation, in *Royal Ahold*, plaintiffs raised a “reasonable concern that documents may be lost despite Royal Ahold’s best efforts to preserve them” because the company was engaged in a “wide-ranging corporate reorganization” that involved “aggressive divestitures” of “key subsidiaries,” including some “that allegedly played central roles in the company’s purported fraud.” *Id.* at 251-52. No such facts are present in this matter. To the contrary, plaintiffs have conceded that the requested documents will be preserved. Pl. Mem. at 15.

B. Plaintiffs Will Not Suffer Undue Prejudice

Having failed to satisfy their burden of showing that the discovery stay should be lifted in order to preserve evidence, plaintiffs must convincingly demonstrate the second “exceptional circumstance”—that the discovery stay must be lifted in order “to prevent undue prejudice” to them. 15 U.S.C. § 78u-4(b)(3)(B). Congress clearly intended for undue prejudice to be found in only the most extraordinary of circumstances. This is evidenced by the fact that the sole illustration proffered by Congress as to what justifies lifting the stay is “the terminal illness of an important witness,” which “might require the deposition of the witness prior to ruling on the motion to dismiss.” Conf. Rep. No. 104-369 at 736; *see also SG Cowen*, 189 F.3d at 912

(quoting Conf. Rep. No. 104-369). As shown below, plaintiffs fall far short of reaching this high standard for showing undue prejudice.

1. There Is No Exception to the PSLRA Discovery Stay for Productions That Would Not Burden the Defendant

Plaintiffs begin their argument by obfuscating the inquiry this Court should make. Plaintiffs claim that because Marvell previously produced many of the requested documents to government agencies, “the burden of producing the same set of documents to Lead Plaintiffs will be slight” Pl. Mem. at 14. Plaintiffs then attempt to use this perception that Marvell could “easily reproduce[]” these documents as somehow supporting their argument that the discovery stay is unduly prejudicing them and should be lifted. *Id.* at 2, 4. Assuming for the sake of argument that Marvell could “easily reproduce” these documents, the production burden on Marvell is not the proper inquiry. “There is no exception to the discovery stay for cases in which discovery would not burden the defendant. The proper inquiry under the PSLRA is whether the plaintiff would be unduly prejudiced by the stay, not whether the defendant would be burdened by lifting the stay.” *In re Smith Barney Transfer Agent Litig.*, No. 05 Civ. 7583 (WHP), 2006 WL 1738078, at *3 (S.D.N.Y. June 26, 2006) (Pauley, J.) (denying plaintiffs’ motion to lift the PSLRA discovery stay). Courts in this Circuit have rejected this “minimal burden” argument. *See, e.g., Countrywide*, 542 F. Supp. 2d at 1180 (rejecting motion to lift the stay despite plaintiffs’ argument that production would “pose a ‘minimal’ burden on the Defendants”); *Marvell*, 2007 WL 1545194, at *3 (“minimal burden to the defendants . . . does not independently justify lifting a stay”).⁴

2. There is No Exception to the PSLRA Discovery Stay For Documents Previously Produced to Government Agencies or Other Private Parties

Plaintiffs repeatedly argue that the discovery stay should be lifted because Marvell has already provided documents to the SEC, the DOJ and the plaintiffs in the derivative action. Pl.

⁴ *See also In re Elan Corp. Sec. Litig.*, No. 02 Civ.865 RMB FM, 2004 WL 1303638, at *1 (S.D.N.Y. May 18, 2004) (Maas, J.) (finding that absence of an undue burden on defendants to produce the requested documents “does not justify overriding the existing statutory stay”).

1 Mem. at 8-9. This assertion finds no support in the text or purpose of the statute. Congress did
 2 not “create[] an exception to the PSLRA stay for private securities plaintiffs hoping to exploit
 3 simultaneous government investigations.” *In re Odyssey Healthcare, Inc. Sec. Litig.*, No.
 4 Civ.A.3:04-CV-0844-N, 2005 WL 1539229, at *1 (N.D. Tex. June 10, 2005) (Godbey, J.); *see*
 5 *also Countrywide*, 542 F. Supp. 2d at 1180 n.29 (“there is no ‘categorical exception’ to the
 6 PSLRA discovery stay for documents that have already been provided to a governmental agency
 7 or other private parties.”); *In re Elan Corp. Sec. Litig.*, No. 02 Civ.865 RMB FM, 2004 WL
 8 1303638, at *1 (S.D.N.Y. May 18, 2004) (Maas, J.) (same). Indeed, there is absolutely nothing
 9 “exceptional” about a simultaneous SEC investigation and securities class action. *See Sisk v.*
 10 *Guidant Corp.*, No. 1:05-cv-01658-SEB-WTL, 2007 WL 1035090, at *4 (S.D. Ind. Mar. 30,
 11 2007) (Barker, J.) (“[t]his circumstance is not exceptional, and does not prejudice Plaintiffs in an
 12 unfair manner outside the policy considerations inherent in the PSLRA.”).

13 If the production of documents to the SEC or other government agency is deemed to
 14 qualify as an “exceptional circumstance” justifying lifting of the discovery stay, the statutory
 15 stay would be eviscerated. Thus, district courts in this Circuit and around the country frequently
 16 deny plaintiffs’ requests to lift the discovery stay so they can obtain documents previously
 17 produced to government agencies. *See, e.g., Asyst*, 2008 WL 916883, at *2-3 (denying motion to
 18 lift the discovery stay for limited discovery of documents produced by Asyst to the SEC and
 19 DOJ); *Deutsche Bank*, 2008 WL 534535, at *2 (“The fact that relevant information has been
 20 made available in the course of other civil and criminal actions not subject to the Act’s discovery
 21 stay is by itself insufficient to show undue prejudice”); *Am. Funds*, 493 F. Supp. 2d at 1104
 22 (refusing to partially lift discovery stay to allow plaintiffs to obtain documents already produced
 23 to the California Attorney General’s Office); *Lantronix*, 2003 WL 22462393, at *2 (denying
 24 plaintiff’s motion to lift the discovery stay because of prior document productions to government
 25 agencies and state court plaintiffs); *NextCard*, 2003 WL 23142199, at *2 (denying request to
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 27
 28

1 partially lift discovery stay in class action so plaintiffs could obtain documents NextCard
2 produced to the SEC, FDIC and the Office of the Comptroller of the Currency).⁵

3 The cases relied upon by plaintiffs are inapposite. Plaintiffs rely heavily on *WorldCom*
4 and *Enron*—cases involving two of the largest corporate frauds and bankruptcies in United
5 States history. Courts consistently distinguish *WorldCom* and *Enron* as exceptional situations
6 where “the defendant corporation has filed for bankruptcy or engaged in wholesale document
7 shredding. . . .” *Guidant*, 2007 WL 1035090, at *4; *see, e.g., Deutsche Bank*, 2008 WL 534535,
8 at *2 (*WorldCom* and *Enron* cases cited by plaintiffs “involved unique additional circumstances,
9 such as corporate bankruptcy and global settlement negotiations”); *Am. Funds*, 493 F. Supp. 2d
10 at 1105-06 (distinguishing *WorldCom* because it involved “unique circumstance” of corporate
11 bankruptcy); *Vivendi*, 381 F. Supp. 2d at 130-31 (same). As shown more thoroughly below in
12 Section II.B.3, the bankruptcies of the defendant corporations in *WorldCom*, *Enron* and *Delphi*
13 distinguish these cases from the posture here where Marvell is financially very healthy. As the
14 *Delphi* court stated: “It was precisely because the defendants in *Enron* and *WorldCom* were
15 bankrupt and subject to other civil lawsuits that a partial lifting of the PSLRA stay was
16 necessary. . . .” *In re Delphi Corp. Sec., Deriv. & “ERISA” Litig.*, MDL No. 1725, 2007 WL
17 518626, at *7 (E.D. Mich. Feb. 15, 2007) (Rosen, J.) (holding that *Delphi*’s bankruptcy justified
18 lifting the discovery stay).⁶

19
20 ⁵ *See also Guidant*, 2007 WL 1035090, at *4 (denying motion to partially lift discovery stay
21 for documents provided to the FDA, SEC, DOJ, and the New York State Attorney General);
22 *Smith Barney*, 2006 WL 1738078, at *1 (denying motion to lift discovery stay for documents
23 defendants had previously produced to the SEC); *Fannie Mae*, 362 F. Supp. 2d at 38-39
24 (refusing to lift mandatory stay where documents had already been produced to governmental
25 and regulatory agencies); *Elan*, 2004 WL 1303638, at *1 (refusing to lift stay where documents
26 were previously produced to the SEC); *Vivendi*, 381 F. Supp. 2d at 129, 131 (refusing to partially
27 lift discovery stay where defendants had previously produced documents to various agencies,
28 including the DOJ and SEC); *In re AOL Time Warner, Inc. Sec. & “ERISA” Litig.*, No. 1500, 02-
5575 SWK, 2003 WL 21729842, at *1 (S.D.N.Y. July 25, 2003) (Kram, J.) (refusing to lift
discovery stay where documents had previously been produced to various government agencies,
including SEC and DOJ).

⁶ *Tobias Holdings, Inc. v. Bank United Corp.*, 177 F. Supp. 2d 162 (S.D.N.Y. 2001)
(Scheidlin, J.), is distinguishable because it presented a “narrow question” as to “whether the
PSLRA stays discovery with respect to plaintiffs non-fraud state law claims where jurisdiction
over such claims is based on diversity of citizenship.” *Id.* at 164-65. That “narrow question” has
not been asked here.

1 Plaintiffs cite several decisions that lifted the PSLRA discovery stay without explaining
 2 the “exceptional circumstances” present in those cases—but not present here—or the extent to
 3 which the court lifted the discovery stay. Pl. Mem. at 10. In *Global Intellicom, Inc. v. Thomson*
 4 *Kernaghan & Co.*, No. 99 CIV 342 (DLC), 1999 WL 223158, at *2 (S.D.N.Y. Apr. 16, 1999)
 5 (Cote, J.), the court lifted the discovery stay because the defendants, “based on holdings acquired
 6 in connection with [the] alleged scheme,” were “seeking to take over the [plaintiff] company in
 7 other forums, raising the possibility that success in those forums will prevent Global from
 8 seeking redress in this Court.” In other words, defendants were attempting to obtain control of
 9 the plaintiff; once that control was obtained, they could terminate the litigation. In *Anderson v.*
 10 *First Security Corp.*, 157 F. Supp. 2d 1230, 1242 (D. Utah 2001), the court only lifted the
 11 discovery stay for discovery from third-parties Zions Bank and certain of Zions Bank’s
 12 employees because they were willing to voluntarily provide documents and information to
 13 plaintiffs but were precluded from doing so due to provisions in a confidentiality agreement
 14 between First Security and Zions Bank that First Security refused to waive. Similarly, in *In re*
 15 *Flir Systems, Inc. Securities Litigation*, No. Civ. 00-360-HA, 2000 WL 33201904, at *2-3 (D.
 16 Or. Dec. 13, 2000) (Haggerty, J.), the court only lifted the discovery stay to allow for discovery
 17 from a third-party who had already filed a civil complaint in state court that “directly
 18 corroborate[d] plaintiff’s allegations of fraud” and who was willing to provide information
 19 voluntarily but for defendants’ threat of legal action against him if he did so.

20 Plaintiffs’ other authority ignores the language and purpose of the PSLRA and therefore
 21 is inconsistent with controlling Ninth Circuit authority. *In re FirstEnergy Corp. Sec. Litig.*, 229
 22 F.R.D. 541, 545 (N.D. Ohio 2004) (Gwin, J.), and *In re Tyco Int’l, Ltd. Multidistrict Litig.*, No.
 23 MDL 02-1335-B, 2003 WL 23830479, at *1 (D.N.H. Jan. 29, 2003) (Barbadoro, J.) did not find
 24 any “exceptional circumstances” other than the fact that defendants had already produced
 25 documents to the government. As noted previously, Congress did not include an exception in the
 26 PSLRA for cases where documents have been produced to government agencies. *See supra* at 9-
 27 10. A much higher bar for “exceptional circumstances” has been set in this Circuit. *See SG*
 28 *Cowen*, 189 F.3d at 913; *Medhekar*, 99 F.3d at 328. Further, the courts in plaintiffs’ cases did

1 not even address one of the key purposes of the discovery stay: to ensure plaintiffs satisfy the
 2 PSLRA's heightened pleading standards before they have access to information or records in
 3 discovery. *See Medhekar*, 99 F.3d at 328.

4 **3. Plaintiff Will Not Suffer Undue Prejudice to Their Litigation Strategy** 5 **or Settlement Prospects**

6 Plaintiffs claim that they need discovery in order to make "informed decisions about their
 7 litigation strategy" and to "fully evaluate the strengths and weaknesses of Defendants' defenses."
 8 Pl. Mem. at 4. But plaintiffs' situation is no different from the situation faced by *every* plaintiff
 9 in *every* securities lawsuit and thus is not "exceptional." "Prejudice caused by the delay inherent
 10 in the PSLRA's discovery stay cannot be 'undue' prejudice because it is prejudice which is
 11 neither improper nor unfair. Rather, it is prejudice which has been mandated by Congress." *In*
 12 *re CFS-Related Sec. Fraud Litig.*, 179 F. Supp. 2d 1260, 1265 (N.D. Okla. 2001). *See also In re*
 13 *Fannie Mae Sec. Litig.*, 362 F. Supp. 2d 37, 38 (D.D.C. 2005) (Leon, J.) (rejecting plaintiffs'
 14 argument that without discovery materials, they would be unable to plan their litigation and
 15 settlement strategies); *Odyssey Healthcare*, 2005 WL 1539229, at *2 (rejecting "amorphous
 16 notion" that securities plaintiffs suffer "undue prejudice" when they have "a perceived inability
 17 to make informed decisions about litigation strategy").

18 Plaintiffs also contend that they need discovery because they are at an "informational
 19 disadvantage relative to other prosecuting parties" against whom they "are competing for the
 20 same pot of limited funds" that have been significantly depleted by Marvell's settlement with the
 21 SEC and tentative settlement of the derivative action. Pl. Mem. at 3, 7. This contention is
 22 wrong. "'Undue prejudice' does not arise from a delay in the gathering of evidence or the
 23 development of settlement or litigation postures." *Smith Barney*, 2006 WL 1738078, at *2; *see*
 24 *also Fannie Mae*, 362 F. Supp. 2d at 39 (same); *Lantronix*, 2003 WL 22462393, at *2 (same).⁷

25
 26 ⁷ Plaintiffs state that their "mediation efforts with Defendants have not been successful" and
 27 that "the lack of access to *any* internal documents" make attempted settlement efforts "more
 28 difficult." Pl. Mem. at 2, 4. While the parties did conduct a mediation in November 2007 that
 proved to be short and unsuccessful, the parties have not engaged in any settlement discussions
 since that time. The settlement discussions did not break off due to plaintiffs' lack of access to
 Marvell's documents.

1 Plaintiffs complain that they effectively are being “left behind” with the settlements of
 2 the SEC and derivative actions. This is a curious contention. Assuming for the sake of argument
 3 that Marvell’s settlements with the SEC and tentative settlement of the derivative action have
 4 somehow harmed the class action plaintiffs (they did not), it is entirely unclear how producing
 5 documents to the class action plaintiffs now will alleviate this harm. As the *Lantronix* court
 6 reasoned when it refused a similar request to lift the PSLRA discovery stay: “Although
 7 Lantronix has apparently settled with plaintiffs in another action, Plaintiff here makes no
 8 showing of how the discovery materials sought are necessary at this moment to effectuate a
 9 settlement in this case or how one settlement in another case creates anything more than the
 10 routine delay contemplated by the PSLRA.” 2003 WL 22452393, at *2.

11 Moreover, plaintiffs’ own authority shows that an “informational disadvantage” relative
 12 to other interested parties only qualifies (if it does) as an “exceptional circumstance” that justifies
 13 lifting the stay when urgency exists because there are insufficient funds available due to a
 14 defendant that is financially *in extremis* or already in bankruptcy. In *WorldCom*, *Enron*, *Delphi*,
 15 *Lernout*, and *Royal Ahold*, the defendant corporations were in bankruptcy or in dire financial
 16 straits. See *Deutsche Bank*, 2008 WL 534535, at *2 (distinguishing plaintiffs’ authorities due to
 17 corporate bankruptcies); *Am. Funds*, 493 F. Supp. 2d at 1106 (same). In *Royal Ahold*, for
 18 example, the court lifted the discovery stay because the company was engaged in a “wide-
 19 ranging corporate reorganization” that involved “aggressive divestitures” that, “like WorldCom’s
 20 bankruptcy, create[d] a risk that delay may limit recovery.” 220 F.R.D. at 251-52. Notably, the
 21 court did not lift the discovery stay for defendant Deloitte & Touche because it was not
 22 reorganizing its affairs like Royal Ahold. *Id.* at 252-53. In *In re Lernout & Hauspie Sec. Litig.*,
 23 214 F. Supp. 2d 100 (D. Mass. 2002) (Saris, J.), the corporate defendant was a Belgian company
 24 in bankruptcy facing potential dissolution. *Id.* at 108-109. Despite these circumstances, the
 25 *Lernout* court only lifted the discovery stay for “any party with respect to which a motion to
 26 dismiss has been denied. . . .” *Id.* at 109. Marvell’s motion to dismiss has not been denied here.
 27 See also *Delphi*, 2007 WL 518626, at *7 (stay lifted where plaintiffs faced the prospects of
 28 “being left with nothing” due to Delphi’s bankruptcy and substantial settlements depleting what

little funds remained); *In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 306 (S.D.N.Y. 2002) (Cote, J.) (stay lifted where plaintiffs faced “the very real risk that it will be left to pursue its action against defendants who no longer have anything or at least as much to offer” due to WorldCom’s bankruptcy and a court ordered global settlement discussion for all matters); *In re Enron Corp. Sec., Deriv. & “ERISA” Litig.*, No. MDL-1446, Civ. A H-01-3624, 2002 WL 31845114, at *1-2 (S.D. Tex. Aug. 16, 2002) (Harmon, J.) (lifting discovery stay where Enron Corporation was in bankruptcy).

In stark contrast to the situations present in plaintiffs’ cited authority, Marvell is a financially healthy company with over \$700 million in cash or cash equivalents, quarterly net revenue of over \$804 million, and quarterly net income of nearly \$70 million. *See* Marvell 10-Q filed June 6, 2008, at 3-5 (Glazner Decl., Ex. B). Here, Marvell’s \$10 million SEC civil penalty and tentative derivative settlement that includes payment of plaintiffs’ attorneys’ fees up to \$16 million falls (\$26 million in total) does not constitute a significant depletion of available funds. Even if Marvell had no remaining insurance funds (it does), the Company clearly has sufficient cash to cover any settlement of this action. Thus, Marvell’s financial health precludes a finding of “exceptional circumstances” related to a possible settlement. *See, e.g., Smith Barney*, 2006 WL 1738078, at *2 (refusing to find undue prejudice because the defendants were solvent and plaintiffs “offer[ed] no evidence that Defendants lack[ed] the resources needed to reach a settlement or to satisfy a judgment.”); *Vivendi*, 381 F. Supp. 2d at 130-31 (refusing to find undue prejudice where there was “no evidence” that plaintiffs face the prospect “that they would be left without remedy in light of settlement discussions”).

4. Plaintiffs Will Not Suffer Undue Prejudice From Defendants’ Arguments In Their Motions to Dismiss that Plaintiffs Cannot Selectively Quote Marvell’s Public Disclosure of the Special Committee’s Findings

Plaintiffs also argue that Marvell’s use of the published findings of Marvell’s Special Committee charged with investigating Marvell’s stock option granting policies in its motion to dismiss constitutes using the PSLRA discovery stay as both a “sword” and a “shield” that necessitates the production of the Special Committee’s draft and final reports. Pl. Mem. at 13.

1 *Marvell and the other defendants do not rely upon the Special Committee's report in their*
 2 *motions to dismiss.* Instead, as shown in Marvell's motion to dismiss, Marvell argued that
 3 plaintiffs cannot be permitted to selectively quote or cherry-pick the Special Committee's
 4 published findings and conclusions. Marvell's arguments are rooted in the uncontroversial
 5 position that the Court should consider the entire disclosure, not just the parts plaintiffs think
 6 benefit their allegations, when it engages in a "comparative inquiry" of "competing inferences
 7 rationally drawn from the facts alleged." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct.
 8 2499, 2504, 2509-10 (2007); *see* Marvell's Motion to Dismiss filed October 18, 2007, at 17-24.
 9 Plaintiffs provide no authority in this or any other Circuit where defendants' use of a special
 10 committee's findings and conclusions published in a corporate defendant's SEC filings required
 11 the corporate defendant to produce the special committee's report, let alone drafts of the report,
 12 and all documents collected or reviewed by the committee. Pl. Mem. at 5.

13 **5. The PSLRA Discovery Stay Is Not Limited to Cases In Which The** 14 **Court Perceives Abuses**

15 Plaintiffs also argue, as plaintiffs did in the derivative action, that the PSLRA's discovery
 16 stay provisions should not apply here because, in their opinion, this case does not represent any
 17 of the perceived abuses the PSLRA was designed to prevent, *e.g.*, a "fishing expedition to
 18 support frivolous claims" or the threat of "costly discovery requests" to extract a settlement. Pl.
 19 Mem. at 14. This argument ignores the statute's plain meaning. The PSLRA discovery stay
 20 contains no provision limiting its application to only those cases in which there are abuses. As
 21 this Court noted in its order denying the derivative plaintiffs' similar request to lift the PSLRA
 22 discovery stay: "Congress did not merely instruct courts to stay discovery in cases in which
 23 courts perceived abuses." *Marvell*, 2007 WL 1545194, at *3; *see also Medhekar*, 99 F.3d at 328
 24 ("Congress clearly intended that complaints in these securities actions should stand or fall based
 25 on the actual knowledge of the plaintiffs rather than information produced by the defendants
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1 after the action has been filed.”). Plaintiffs’ effort to re-write the statute should not be
 2 countenanced.⁸

3 **C. Plaintiffs’ Document Requests Are Not Particularized and Will Unduly**
 4 **Burden Marvell**

5 Even if plaintiffs had sustained their burden of demonstrating an imminent risk that
 6 evidence may be lost or that they will otherwise suffer undue prejudice as a result of the
 7 discovery stay, the PSLRA also requires that their requested discovery be “particularized.” 15
 8 U.S.C. § 78u-4(b)(3)(B). Here, plaintiffs’ discovery requests are not particularized and, in fact,
 9 would impose a significant undue burden on Marvell.

10 Plaintiffs have asked for “all documents” Marvell’s Special Committee and outside
 11 auditors collected or reviewed, “all documents” Marvell produced to the SEC or DOJ, “all
 12 documents” Marvell provided to the plaintiffs in the derivative action, and all drafts or final
 13 Special Committee reports. Pl. Mem. at 5. Plaintiffs argue that these requests are “highly
 14 particularized” because they already have been assembled and produced to governmental
 15 entities. *Id.* at 11. Courts around the country, however, have rejected such contentions. *See,*
 16 *e.g., Countrywide*, 542 F. Supp. 2d at 1180 n.29 (denying plaintiffs’ request for an exception to
 17 the PSLRA’s discovery stay because plaintiffs’ requests were not particularized and noting that
 18 requests for documents produced in other proceedings are not necessarily particularized); *Am.*
 19 *Funds*, 493 F. Supp. 2d at 1104, 1107 (finding that plaintiffs’ request for all documents
 20 defendants produced to the California Attorney General’s Office was not sufficiently
 21 particularized under the PSLRA’s standards); *Fannie Mae*, 362 F. Supp. 2d at 38-39 (denying
 22 plaintiffs’ request to lift the PSLRA discovery stay for documents produced to governmental
 23 agencies because such requests were not particularized); *Vivendi*, 381 F. Supp. 2d at 130
 24 (denying plaintiffs’ motion to lift PSLRA discovery stay for documents provided to French and

25 _____
 26 ⁸ Plaintiffs’ reliance on *Vacold LLC v. Cerami*, No. 00 CIV.4024 (AGS), 2001 WL 167704
 27 (S.D.N.Y. Feb. 16, 2001) (Schwartz, J.), is misplaced. The *Vacold* court acknowledged that
 28 Ninth Circuit authority contradicts its conclusion that the discovery stay should be lifted when no
 abuses were present in the instant action, and there was a possibility that the stay may shield
 defendants from liability. *Id.* at *6 (citing *SG Cowen* as a “*but see*”). *See also Asyst*, 2008 WL
 916883, at *2 (recognizing the “tension” between Ninth Circuit authority and *Vacold*).

1 U.S. governmental agencies, including the SEC and DOJ, because a request for such documents
2 was not sufficiently particularized).

3 Plaintiffs also argue that Marvell could produce the requested documents “with minimal,
4 if any, burden” and that such a production would “not cause Marvell to incur additional
5 expenses.” Pl. Mem. at 5, 14. Plaintiffs are wrong. The burden on Marvell would be both
6 significant and expensive. For example, in connection with the SEC’s investigation, Marvell
7 produced hundreds of thousands of pages of documents that are completely irrelevant to the
8 claims asserted in this case. Plaintiffs’ requests, therefore, are not sufficiently particularized and
9 would require Marvell to sift through its SEC production to remove these irrelevant documents
10 from any production in this case. Courts have recognized that requests calling for irrelevant
11 documents do not comply with the PSLRA’s particularity requirement. *See Countrywide*, 542 F.
12 Supp. 2d at 1180 n.29 (refusing to lift PSLRA discovery stay, noting that requests for documents
13 previously produced in government investigations or other litigation are not particularized if they
14 call for documents that are “irrelevant to the claims asserted in *this* case”); *Am. Funds*, 493 F.
15 Supp. 2d at 1107 (refusing to lift PSLRA discovery stay because plaintiffs did not identify
16 “specific categories or types of documents sought” from defendants’ production to the California
17 Attorney General’s Office “or how the documents sought will be relevant to the claims Plaintiffs
18 intend to assert in this case”); *Fannie Mae*, 362 F. Supp. 2d at 39 (refusing to lift PSLRA
19 discovery stay for documents produced in response to government investigations because they
20 were “voluminous and possibly irrelevant to the claims likely to be raised” in a consolidated
21 complaint). Similarly, plaintiffs’ requests would require Marvell to review documents for
22 privilege prior to their production. This laborious and expensive review would be necessary
23 because plaintiffs have requested broad categories that comprise documents protected by the
24 attorney-client privilege or the attorney work product doctrine, *e.g.*, drafts of any Special
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1 Committee reports, documents collected and reviewed by the Special Committee, and other
2 documents protected by attorney-client privilege or the attorney work product doctrine.⁹

3 CONCLUSION

4 For the foregoing reasons, Marvell respectfully requests that the Court deny Lead
5 Plaintiff's Motion for Partial Modification of the PSLRA Discovery Stay.

6
7 Dated: August 22, 2008

Respectfully submitted,

8 WILSON SONSINI GOODRICH & ROSATI
9 Professional Corporation

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11 By: /s/ Steven M. Schatz
12 Steven M. Schatz

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24 ⁹ Plaintiffs' request that in the event the Court denies defendants' motions to dismiss, it order
25 Marvell to "*immediately* produce" the documents sought in their Motion. Pl. Mem. at 5 n.2
26 (emphasis added). While plaintiffs may view the Federal Rules of Civil Procedure as an
27 "unnecessary waste of time and resources," Marvell does not. *Id.* In light of the relevance and
28 privilege objections Marvell would be required to make in response to plaintiffs' premature
document requests, and the time and expense involved in reviewing these documents for
relevance and privilege, compliance with an order to "immediately produce" all documents
requested by plaintiffs would be impossible. *Id.* Discovery in this matter should follow the
course proscribed by the Federal Rules of Civil Procedure if and when plaintiffs demonstrate the
legal sufficiency of their complaint.

ATTESTATION PURSUANT TO GENERAL ORDER 45

I, Gregory L. Watts, am the ECF User whose identification and password are being used to file Marvell's Opposition to Lead Plaintiffs' Motion for Partial Modification of the PSLRA Discovery Stay. In compliance with General Order 45.X.B., I hereby attest that Steven M. Schatz has concurred in this filing.

Dated: August 22, 2008

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Gregory L. Watts
Gregory L. Watts